Supreme Court, U.S.
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NO. 85-2098

In The

UNITED STATES SUPREME COURT

October Term 1986

RICHARD RUSSELL,)
)
Petitioner)
)
v.)
)
SAM MILLSAP, JR.,)
et al.,)
)
Respondents.)

BRIEF OF RESPONDENT, JOHN M. PINCKNEY, III, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENT,
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The Respondent, John M. Pinckney III, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the opinion of the United States Court of Appeals for the Fifth Circuit in this case. That opinion is reported at 781 F.2d 381 and appears in the Appendix to the

Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The Petitioner initiated the present action on or about October 11, 1984. Petitioner generally alleged that his civil rights had been violated through the entry of a permanent injunction which enjoined him from engaging in the business of massage in San Antonio, Bexar County, Texas. Respondent Pinckney was the retained counsel for Petitioner in that proceeding. Petitioner brought suit against Respondent Pinckney for Respondent Pinckney's alleged participation in the issuance of this injunction. In response to Petitioner's suit, Respondent filed a motion to dismiss for failure to state a claim under 42 U.S.C. § 1983 pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

On or about January 17, 1985, the United States District Court for the Western

District of Texas, the Honorable Hippolito Garcia presiding, referred Petitioner's suit to the United States Magistrate for findings of fact and recommendations. On January 23, 1985, the Magistrate recommended that the suit be dismissed with prejudice for failure to state a claim under 42 U.S.C. § 1983. The Magistrate also found that the complaint was "utterly frivolous."

On or about February 25, 1985, the United States District Court for the Western District of Texas, the Honorable Hippolito Garcia presiding, dismissed Petitioner's lawsuit. The District Court found Petitioner's lawsuit was "frivolous, unreasonable and wholly without foundation" and awarded attorneys' fees to the Defendants, including the Respondent herein.

The Petitioner appealed the dismissal of his suit to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit upheld the dismissal of the suit

against Respondent Pinckney on the grounds that Respondent was not acting under color of state law as Petitioner's retained attorney. The Fifth Circuit further found that Petitioner's allegations of a conspiracy to deprive him of his civil rights were insufficient to state a cause of action under 42 U.S.C. § 1983 against Respondent Pinckney. The Fifth Circuit also upheld the award of attorneys' fees against Petitioner observing that the District Court had found Petitioner's suit frivolous and totally without merit.

REASONS FOR DENYING THE WRIT

As hereinafter indicated, this case does not satisfy this Court's criteria for granting review by Writ of Certiorari as set forth in Rule 17 of the Rules of this Court.

1. The Decision of the Court Below Affirming the Dismissal of Petitioner's 42 U.S.C. § 1983 Action Against Respondent Pinckney Does Not Conflict with

Decisions of this Court or with Decisions of Other Courts of Appeals.

Petitioner challenges the dismissal of his suit for failing to state a "Civil Rights Claim." See Petition for Writ of Certiorari at 10. Petitioner bases his challenge upon an alleged direct violation of the Eighth Amendment to the United States Constitution. Id.

The Fifth Circuit held that Respondent Pinckney, who was Petitioner's retained counsel in the proceedings out of which the complained of injunction was issued, did not act under color of state law. As a result, a 42 U.S.C. § 1983 action was not established. The Fifth Circuit's holding that a retained counsel does not act under color of state law does not conflict with decisions of this Court. See Polk County v. Dodson, 454 U.S. 312, 102 S. Ct. 445, 70 L.Ed.2d 509 (1981). The Fifth Circuit's decision also does not conflict with decisions of other Courts of

Appeals. See Rivera v. Green, 775 F. 2d 1384 (9th Cir. 1985); Cornes v. Munoz, 724 F. 2d 61 (7th Cir. 1983); Black v. Bayer, 672 F. 2d 309 (3rd Cir.), cert. denied, 459 U.S. 916 (1982); Ellison v. De La Rosa, 685 F. 2d 959 (5th Cir. 1982); Hall v. Quillen, 631 F. 2d 1154 (4th Cir. 1980), cert. denied, 454 U.S. 1141 (1982); Barnes v. Dorsey, 480 F. 2d 1057 (8th Cir. 1973); Page v. Sharpe, 487 F.2d 567 (1st Cir. 1973); Szijarto v. Legeman, 466 F. 2d 864 (9th Cir. 1972); Mulligan v. Schlachter, 389 F. 2d 231 (6th Cir. 1968).

The Fifth Circuit also ruled that Petitioner's allegations of conspiracy to violate Petitioner's civil rights against Respondent Pinckney were at best conclusionary and were insufficient to state a claim under 42 U.S.C. § 1983. In reaching this conclusion, the Fifth Circuit did not render a decision which conflicts with the decisions of other Courts of Appeals. See Sooner Products v. McBride, 708 F. 2d 510 (10th Cir.

1983); Arsenaux v. Roberts, 726 F. 2d 1022 (5th Cir. 1982); Aldabe v. Aldabe, 616 F. 2d 1089 (9th Cir. 1980); Slotnick v. Staviskey, 560 F. 2d 31 (1st Cir. 1977), cert. denied, 434 U.S. 1077 (1978); Cerbone v. County of Westchester, 508 F. Supp. 780 (S. D. N. Y. 1981).

Petitioner makes a cryptic reference to the Eighth Amendment to the United States Constitution as providing a basis for his cause of action against Respondent Pinckney. See Petition for Writ for Certiorari at 10. Petitioner apparently asserts that, since there is allegedly a direct violation of the Eighth Amendment, he has stated a cause of action under 42 U.S.C. § 1983. Petitioner does not specify the portion of the Eighth Amendment which he feels provides the basis for his suit. Irrespective of Petitioner's argument, the Petition for Writ of Certiorari is the first occasion in which Petitioner has raised any argument concerning the Eighth

Amendment.

It is axiomatic that "(a) party cannot raise a new theory on appeal that was not presented to the court below." Capps v. Humble Oil & Refining Co., 536 F. 2d 80, 82 (5th Cir.), citing Wolfe v. Frank, 477 F. 2d 467 (5th Cir. 1976), cert. denied, 414 U.S. 975, 38 L.Ed.2d 218, 94 S. Ct. 287 (1973) and Autrey v. Williams And Dunlap, 343 F. 2d 730 (5th Cir. 1965). This Court has steadfastly held to a similar rule. Brown v. Socialist Workers '74 Campaign Committee (Ohio), 459 U.S. 87, 74 L.Ed.2d 250, 264, 103 S. Ct. 416 (1982); United States v. Mitchell, 445 U.S. 535, 546, n. 7, 63 L.Ed.2d 607, 618, n. 7, 100 S. Ct. 1349 (1980); Adickes v. Kress & Co., 398 U.S. 144, 147, n. 2, 26 L.Ed.2d 142, 148, n. 2, 90 S. Ct. 1598 (1970). Thus, Respondent Pinckney urges this Honorable Court to decline to consider Petitioner's allegation that the Eighth Amendment to the United States Constitution would support a 42

U.S.C. § 1983 cause of action in the present case.

2. The Decision of the Court Below Affirming the Award of Attorneys' Fees to Respondent Pinckney Does Not Conflict with the Decisions of This Court or with the Decisions of Other Courts of Appeals.

Petitioner asserts that the Fifth Circuit's affirmance of the District Court's award of attorneys' fees against Petitioner conflicts with previous decisions of this Court. Specifically, Petitioner claims that the award of attorneys' fees against him, a pro se litigant, conflicts with this Court's decision in Hughes v. Rowe, 449 U.S. 5, 101 S. Ct. 173, 66 L.Ed.2d 163 (1981).

In the present case, the Fifth Circuit did not intervene in the District Court's award of attorneys' fees because the Fifth Circuit found no abuse of discretion in the District Court's action. The Fifth Circuit

observed that the District Court had found Petitioner's complaint to be frivolous, unreasonable, wholly without foundation and in bad faith.

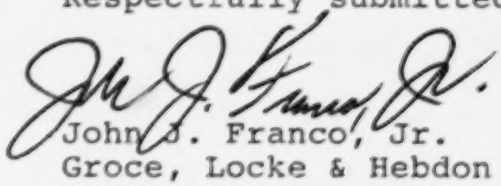
This Court's decision in Hughes v. Rowe, supra, does not hold that attorneys' fees can never be awarded against pro se litigants. The Hughes decision warns against the ready award of attorneys' fees against pro se litigants and cautions that such awards should not be made routinely. This Honorable Court did not bar the award of attorneys' fees against a pro se litigant where the suit was found to be frivolous, without merit or brought in bad faith. The Court's opinion does indicate that an award can be made against an unrepresented litigant where the suit is found to be frivolous, unreasonable or without foundation. Since there is no absolute bar to such an award, the Fifth Circuit's affirmance of the District Court's award does not conflict with any decision of

this Court. See also Partee v. Lane, 528 F. Supp. 1254 (M.D.Ill. 1981).

CONCLUSION

For the reasons stated above, Respondent John M. Pinckney, III believes that the Court should deny the Petition for Writ of Certiorari and respectfully requests this Court to so rule.

Respectfully submitted,



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July 16, 1986